which utilities were eligible for reimbursement. It simply clarified that "eligible" utility relocation costs were included in the cost of right-of-way acquisition within the meaning of former Article 6674q-4.

To conclude that the Legislature used the word eligible in former Article 6674n-3 ("which cost may be eligible under the law") to mean constitutional is not a reasonable construction of the statute. The *City of Austin* case was decided in 1960. Article 6674n-3, the source law for Section 251.102, was enacted in 1963. Petitioners submit that the Legislature would not have used the word "eligible" in Article 6674n-3 if it meant constitutional, knowing that the Texas Supreme Court had expressly recognized the distinction between the two concepts and had noted that the Legislature had previously used the word eligible in former Article 6674w-4 to *classify* (and thereby limit) the relocations for which reimbursement would be made. Likewise, the Legislature did not use the term eligible in Section 251.102 of the Texas Transportation Code to mean that all utilities which could be constitutionally reimbursed must be reimbursed.

No Texas cases have previously construed what constitutes an "eligible utility facility" under Section 251.102 of the Texas Transportation Code. However, the same issue presented in the case at bar is also presented in No. 01-05-00668-CV; *Harris County Toll Road Authority & Harris County v. Southwestern Bell Telephone, L.P. d/b/a SBC Texas* (pending before the Court of Appeals for the First District of Texas at Houston). In *Southwestern Bell Telephone*, a state appellate court will determine the proper construction of Section 251.102 of the Texas Transportation Code and whether it requires Harris County to reimburse the telephone company for relocating its utility facilities to accommodate construction of the same Westpark

Tollway that is the subject of the case at bar. The *Southwestern Bell Telephone* case was argued and submitted for that court's determination on April 18, 2006. As this Court said in *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940), "where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise". Petitioners respectfully request that this Court withhold final action on this petition until after the issuance of an opinion in the *Southwestern Bell Telephone* case.

In addition, Petitioners ask this Court to certify the following question of law to the Texas Supreme Court:

> What is the meaning of the term "eligible utility facility" as used in Section 251.102 of the Texas Transportation Code?

In that regard, "the Supreme Court of Texas may answer questions of law certified to it by any federal appellate court if the certifying court is presented with determinative questions of Texas law having no controlling Supreme Court precedent". TEX. R. APP. P. 58.1. Petitioners also ask this Court to reserve its judgment and further proceedings in this case pending its receipt of a response from the Texas Supreme Court. Compare *Lehman Bros. v. Schein*, 416 U.S. 386, 390 (1974) ("That path [certification] is open to this Court and to any court of appeals of the United States."). Certification is warranted in this case because of the adverse financial impact that the Fifth Circuit's construction of the statute will have on Texas counties.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX 1

436 F.3d 541 (5th Cir. 2006)

CENTERPOINT ENERGY HOUSTON ELECTRIC LLC; CenterPoint Energy Entex, an Unincorporated Division of CenterPoint Energy Resources Corp., Plaintiffs-Appellees-Cross-Appellants,

v.

HARRIS COUNTY TOLL ROAD AUTHORITY; Harris County, Defendants-Appellants-Cross-Appellees.

No. 04-20992.

United States Court of Appeals, Fifth Circuit.

Jan. 16, 2006.

Shira R. Yoshor (argued), Jonathan B. Smith, Baker Botts, L.L.P., Houston, TX, for Plaintiffs-Appellees-Cross-Appellants.

Frank Edward Sanders, Asst. Cty. Atty. (argued), Houston, TX, for Defendants-Appellants-Cross-Appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before JOLLY and BARKSDALE, Circuit Judges, and LITTLE, District Judge.[1]

E. GRADY JOLLY, Circuit Judge:

This appeal raises the question whether CenterPoint Energy Houston Electric and CenterPoint Energy Entex

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[1] District Judge of the Western District of Louisiana, sitting by designation.

[collectively "CenterPoint"] may collect from Harris County Toll Road Authority and Harris County [collectively "Harris County"] costs of relocating their utility facilities when Harris County constructed the Westpark Tollway along the pre-existing Westpark Drive in Houston, Texas. CenterPoint also seeks to collect attorney's fees and prejudgment interest. We hold that § 251.102 of the Texas Transportation Code requires reimbursement of CenterPoint's relocation costs, and that the district court failed to provide reasoning sufficient for review of the denial of attorney's fees or prejudgment interest. Thus, we AFFIRM the district court's grant of summary judgment for CenterPoint awarding its relocation costs, VACATE the denial of attorney's fees and prejudgment interest, and REMAND for proceedings not inconsistent with this opinion.

I

The material facts are undisputed. CenterPoint is a utility provider servicing the City of Houston under a franchise agreement originally executed in 1957. CenterPoint has no such agreement with Harris County. CenterPoint maintains electric and gas facilities within the rights-of-way of Houston's city streets, including Westpark Drive, now the Westpark Tollway. CenterPoint has no easement rights in the property.

In June 2001, Harris County began constructing the Westpark Tollway. The construction of the Tollway required CenterPoint to relocate gas and electric utilities at

a cost of over ten (10) million dollars.[2] All of the relocated facilities are within the City of Houston. CenterPoint requested the relocation costs from Harris County both before and after the relocation. Harris County refused payment and this suit followed.

Based on CenterPoint's claims under both the United States and Texas Constitutions, the action was removed to federal court based on 28 U.S.C. §§ 1331 and 1367. The parties agreed that there were no material issues of fact, and accordingly submitted cross-motions for summary judgment. The district court denied Harris County's motion for summary judgment and granted summary judgment for CenterPoint, holding that §§ 251.101 and 251.102 of the Texas Transportation Code required Harris County to reimburse CenterPoint's relocation costs in the amounts of $5,989,772.91 and $4,266,901.06, respectively, to CenterPoint Energy Houston Electric and CenterPoint Energy Entex. The court ordered postjudgment interest of 2.53% per annum. Both parties appealed: Harris County appealed the judgment; CenterPoint appealed the district court's denial of attorney's fees and prejudgment interest.

II

We review the grant or denial of a motion for summary judgment *de novo,* respecting the same legal standards that the district court applied to determine whether summary judgment was appropriate. *Lamar Adver. Co. v. Cont'l Cas. Co.,* 396 F.3d 654, 659 (5th Cir.2005) (citations

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[2] CenterPoint Energy Entex's total relocation expenses were $4,266,901.06. CenterPoint Energy Houston Electric, L.L.C's total relocation expenses were $5,989,772.91.

omitted). A summary judgment motion is properly granted only when, viewing the evidence in the light most favorable to the nonmoving party, the evidence presented demonstrates "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED.R.CIV.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

A

The primary issue presented is whether a Texas utility or the county government must bear utility relocation costs caused by county road construction. The "long-established common law principle [requires] that a utility forced to relocate from a public right-of-way must do so at its own expense." *Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co. of Va.,* 464 U.S. 30, 34, 104 S.Ct. 304, 78 L.Ed.2d 29 (1983). Texas has adopted a similar rule concluding that, because "the main purposes of roads and streets are for travel and transportation . . . [,] it is clear that [utilities may] be required to remove at their own expense any installations owned by them and located in public rights of way whenever such relocation is made necessary by highway improvements." *State v. City of Austin,* 160 Tex. 348, 331 S.W.2d 737, 741 (1960). *See also Benbrook Water & Sewer Auth. v. City of Benbrook,* 653 S.W.2d 320, 323-24 (Tex.App.1983); *City of Grand Prairie v. City of Irving,* 441 S.W.2d 270, 273 (Tex.Civ.App.1969); *City of Grand Prairie v. Am. Tel. & Tel. Co.,* 405 F.2d 1144, 1146 (5th Cir.1969) (all holding as a general rule that utilities can be required to relocate from the public right-of-way at their own expense, and that such rule has been adopted by

the state of Texas).[3] When applying this rule, "[t]here is no material difference . . . between a utility company and a municipal corporation." *City of Austin,* 331 S.W.2d at 741. Thus, if this appeal were determined by common law principles, CenterPoint would be required to bear its own relocation costs. The common law, however, controls only where there is no conflicting or controlling statutory law. *See, e.g., Taylor v. Leonard,* 275 S.W. 134 (Tex.Civ.App.1925); 15 Am.Jur.2d *Common Law* § 1 (2005); 67 Tex. Jur.3d *Statutes* § 3 (2005). We thus turn to examine the applicable statutes.

B

CenterPoint correctly contends that §§ 251.101 and 251.102 of the Texas Transportation Code apply in this case.[4] Section 251.101 provides a means for counties to

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[3] The general rule is altered where the utility required to relocate holds an ownership interest, such as an easement in the property from which the utility facilities were relocated. *See, e.g., City of Grand Prairie,* 405 F.2d at 1146 (holding that where the utility facilities were located in a "private easement . . . the general rule . . . has no application") (citing *Magnolia Pipe Line Co. v. City of Tyler,* 348 S.W.2d 537 (Tex.Civ.App.1961)). However, CenterPoint has no tangible property rights in the land from which it was required to move its utility facilities.

[4] Harris County contends that the general law of the Transportation Code has essentially been trumped by the Harris County Road Law [the Road Law] and the accompanying rules promulgated by Harris County. The Road Law is a state legislative act that provides a mechanism by which counties can acquire property and construct roadways. Harris County argues that it was by this mechanism, not by the process of § 251.101, that it acquired the right-of-way. Because the rules promulgated by Harris County under the authority of the Road Law require utilities to bear relocation costs, Harris County argues that the district court erred in denying its motion for summary judgment. Assuming without deciding that the Road Law applies to property

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acquire property to build or improve roadways. As a part of that process, § 251.102 mandates that "[a] county shall

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within the City of Houston, we find the arguments of Harris County unpersuasive. *See Piney Point Village v. Harris County*, 479 S.W.2d 358, 364 (Tex.Civ.App.1972) (finding that the situation before the court involved only property outside the municipal limits of Houston and declining to determine if the Road Law would apply to property within the City).

We do not dispute that the Harris County Road Law is a "special" law enacted by the Texas Legislature, *see, e.g., id.* at 364 (recognizing the Harris County Road Law as a "special act"), nor do we take issue with the general principle that special acts or provisions prevail over general ones in certain instances where they are in conflict. *See, e.g.*, TEX. GOV'T. CODE ANN. § 311.026(b) (2005). Instead, we hold that any alleged conflict between the Texas Transportation Code and the Harris County Road Law can be harmonized.

Section 311.026 of the Texas Government Code, supplying the rules of interpretation for Texas statutes, states that general and specific statutes "shall be construed, if possible, so that effect is given to both." It is only where the conflict is "irreconcilable" that the specific provision trumps the general one. TEX. GOV'T CODE § 311.026(b). As to cost allocation, there is no such conflict. While the Road Law provides a mechanism for counties to acquire property for road construction, it is does not speak to who bears the relocation costs incurred. Thus, construing together the Transportation Code and the Road Law, § 251.102, requiring the county to bear the relocation costs, is unaffected.

Conflict with the cost-allocation provision of § 251.102 arises only when "The Rules of Harris County, Texas For the Construction of Facilities Within Harris County Road Rights-of-Way" (promulgated by Harris County shortly before it began construction on the Westpark Tollway in 2001) are considered. Section 8 provides in part that utilities forced to relocate facilities in a right-of-way must "bear the cost and expense of any change or alteration." CenterPoint correctly challenges the validity of this County Rule. The rule is in conflict with § 251.102 of the Texas Transportation Code. As such it appears invalid. Even were the rule valid, Harris County has provided no authority demonstrating that a rule or regulation promulgated by a county prevails over a general state statute where they are in conflict. Nor has it demonstrated that § 33 of the Harris County Road Law extends to cover county rules promulgated under the Road Law.

include the cost of relocating or adjusting an eligible utility facility in the expense of right of way acquisition." TEX. TRANSP. CODE ANN. § 251.102 (2005). As we are clearly dealing with a "cost of relocating" resulting from the "acqui[sition of] . . . a right-of-way,"[5] the question is whether CenterPoint is an "eligible utility facility" within the meaning of § 251.102.

Section 251 of the Transportation Code itself does not provide any guidance as to the meaning of "eligible utility facility." Still we are required to "search out carefully the intendment of a statute, giving full effect to all of its terms." *Tex. Highway Com'n v. El Paso Bldg. & Const. Trades Council,* 149 Tex. 457, 234 S.W.2d 857, 863 (1951); *see Bd. of Adjustment v. Wende,* 92 S.W.3d 424, 432

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[5] Harris County argued on appeal that, based on authority granted to it by the Harris County Road Law, it merely assumed an existing right-of-way from the City of Houston, and did not "acquire" it as articulated by §§ 251.101 and 251.102. We find no indication that this argument was presented to the district court. Indeed the district court stated that "[n]either party disputes that CenterPoint had to relocate its facilities on Westpark Drive only after the defendant acquired the City's right of way." As we have often pointed out, "[w]e are a court of errors, and . . . a district court cannot have erred as to arguments not presented to it." *Miller v. Nationwide Life Ins. Co.,* 391 F.3d 698, 701 (5th Cir.2004) (citations omitted). Accordingly the argument is forfeited by the failure to raise it in the court below and is reviewed here only for plain error. *See Crawford v. Falcon Drilling Co.,* 131 F.3d 1120, 1123 (5th Cir.1997) ("more recently our Court has adopted the practice of reviewing unpreserved error in a civil case using the plain-error standard of review").

Under any standard of review, the argument that the property has not been acquired within the meaning of § 251.101 is without merit. Harris County clearly exercised some sort of process or authority that passed control or ownership over the rights-of-way at issue from the City of Houston to Harris County. Thus Harris County "acquire[d] . . . a right-of-way" within the meaning of § 251.101.

(Tex.2002) (Courts "must attempt to give effect to every word and phrase if it is reasonable to do so."). To give full meaning to the modifier "eligible", we turn, to the traditional tools of statutory interpretation.

C

"The primary rule in statutory interpretation is that a court must look to the intent of the legislature and must construe the statute so as to give effect to that intent." *Union Bankers Ins. Co. v. Shelton,* 889 S.W.2d 278, 280 (Tex.1994) (citations omitted); *see also Crimmins v. Lowry,* 691 S.W.2d 582, 585 (Tex.1985) ("A fundamental rule controlling the construction of a statute is to determine, if possible, the intent of the legislature as expressed in the language of that statute."). To determine the intent of the legislature, ordinarily we first look to the words of the statute itself. *See Hightower v. Texas Hosp. Ass'n,* 65 F.3d 443, 448 (5th Cir.1995) ("When courts interpret statutes, the initial inquiry is the language of the statute itself."). However, we have examined the statute, as noted above, and find that the words "eligible utility facility" remain ambiguous. If intent cannot be determined from the words of the text we look to other sources. In this case, those sources have been identified for us in § 311.023 of the Texas Government Code, as discussed *infra.*

It is important as background to our analysis to understand that Texas has been in the process of, and is currently nearing the end of a general recodification of its laws. *See* Legal Research Guides, Texas Statutes and Regulations, http://library.law.smu.edu/resguide/TX-STATS.htm (last visited Nov. 22, 2005). This fact is relevant because in 1995, the Texas Legislature passed Senate Bill 971, "The

Texas Transportation Act" [Transportation Act], which completed the recodification of Texas law relating to transportation. The Transportation Act created the Texas Transportation Code which includes the current §§ 251.101 and 251.102.[6] *See* 1995 Tex. Sess. Law Serv. Chpt. 165 (S.B.971) (West) (now codified at TEX. TRANSP. CODE ANN. § 1.001, et. seq.). The purpose of the Transportation Act was to provide a cogent and organized codification of Texas Transportation law – not to create substantive changes in the law.[7]

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[6] The current version of each section is as follows:

> 251.101. Condemnation for County Road in Municipality
>
> (a) A county may exercise the power of eminent domain in a municipality with the prior consent of the governing body of the municipality to condemn and acquire real property, a right-of-way, or an easement in public or private real property that the commissioners court determines is necessary or convenient to any road that forms or will form a connecting link in the county road system or in a state highway.
>
> . . .
>
> 251.102. Cost of Relocating or Adjusting Utility Facility
>
> A county shall include the cost of relocating or adjusting an eligible utility facility in the expense of right-of-way acquisition.

TEX. TRANSP. CODE ANN. §§ 251.101, 251.102 (2005).

[7] Specifically the Transportation Act provides in section 1.001 that the purpose of the Transportation Act is as follows:

> Sec. 1.001. PURPOSE OF THE ACT
>
> (a) This code is enacted as a part of the state's continuing statutory revision program, begun by the Texas Legislative Council in 1963 as directed by the legislature in the law codified as Section 323.007, Government Code. The program contemplates a topic-by-topic revision of the state's general and permanent statute law without substantive change.
>
> (b) Consistent with the objectives of the statutory revision program, the purpose of this code is to make the law encompassed by this code more accessible and understandable by:

(Continued on following page)

The Transportation Act gives specific instructions relating to its interpretation. Section 1.002 of the Transportation Act, now codified in the Transportation Code, provides that "Chapter 311, Government Code (Code Construction Act), applies to the construction of each provision in this code except as otherwise expressly provided." TEX. TRANSP. CODE ANN. § 1.002 (2005). Because § 251.102 does not "expressly provide[] otherwise" we will look to chapter 311 of the Texas Government Code for interpretive aids.

Section 311.023 of the Texas Government Code provides a list of "construction aids" to be used "[i]n construing a statute, whether or not the statute is considered ambiguous on its face." TEX. GOV'T. CODE ANN. § 311.023 (2005).[8] Two aids are particularly pertinent here – first,

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(1) rearranging the statutes into a more logical order;

(2) employing a format and numbering system designed to facilitate citation of the law and to accommodate future expansion of the law;

(3) eliminating repealed, duplicative, unconstitutional, expired, executed, and other ineffective provisions; and

(4) restating the law in modern American English to the greatest extent possible.

[8] Section 311.023 provides:

In construing a statute . . . a court may consider among other matters the:

(1) object sought to be attained;

(2) circumstances under which the statute was enacted;

(3) legislative history;

(4) common law or former statutory provisions, including laws on the same or similar subjects;

(5) consequences of a particular construction;

(6) administrative construction of the statute; and

(7) title (caption), preamble, and emergency provision.

TEX. GOV'T CODE ANN. § 311.023 (2005).

"the 'title (caption), preamble, and emergency provision'; and second 'former statutory provisions, including laws on the same or similar subjects.'" *Id.* Each will be considered in turn.

(1)

We examine first the "title" and "preamble." The Transportation Act provides that as a part of the "[t]he [general statutory revision] program," it "contemplates a topic-by-topic revision of the state's general and permanent statute law without substantive change". *See* 1995 Tex. Sess. Law Serv. Chpt. 165, § 1.001(a) (S.B.971) (West) (now codified at TEX. TRANSP. CODE ANN. § 1.001(a)). Specifically the Transportation Act is "[a]n Act relating to the adoption of a *nonsubstantive* revision of statutes relating to transportation." *Id.* at preamble (emphasis added). Because the Transportation Act was not intended to create a substantive change in the law, we must conclude that §§ 251.101 and 251.102 retain their meaning before codification.

We turn now to the second construction aid-"former statutory provisions, including laws on the same or similar subjects" to discern the meaning of "eligible utility facility."

(2)

The pre-codification versions of §§ 251.101 and 251.102 of the Transportation Code were Texas Civil Statute Articles 6674n-3 and 6702-1. *See* TEX. TRANSP. CODE ANN. §§ 251.101, 251.102, Historical and Statutory Notes (2005). One of these provisions, article 6674n-3, provides definition to the phrase "eligible utility facility"

and the other, article 6702-1, applies that phrase in the context of county acquisitions.[9]

Our first step in determining the meaning of "eligible" is to examine its use in article 6674n-3 entitled "Costs of relocating or adjusting eligible utility facilities in acquisition of rights-of-way". TEX. CIV. STAT. art. 6674n-3 (1994). Although that provision addressed acquisitions by the Texas Highway Department, the provision gives meaning to the phrase "eligible utility facilities" in the context of the relocation of utility facilities for roadway projects. The provision states: "In the acquisition of all highway rights-of-way by or for the Texas Highway Department, the cost of relocating or adjusting utility facilities which cost may be eligible under the law is hereby declared to be an expense and cost of right-of-way acquisition." TEX. CIV. STAT. art. 6674n-3, § 1. Thus, in article 6674n-3, the title and text combine to provide that "eligible" describes a utility that incurs a relocation cost as a result of a highway acquisition (by the Texas Highway Department), which cost is eligible under the law for reimbursement. Although this reasoning is still circular, we do understand that "eligible" is a modifier of "cost". And, although the statute is in reference to acquisition by the Texas Highway Department, when the acquisition of the right of way here was by the county, the use of the same term in article 6702-1 gives meaning to the phrase in the context of this case.

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[9] The interconnection of these former statutes is further evidenced by the legislative reference to *both* article 6674n-3 and article 6702-1 as the prior basis for the current § 251.102 of the Transportation Code. *See* TEX. TRANSP. CODE ANN. § 251.102, Historical and Statutory Notes, Prior Laws.

Article 6702-1 of the same title states: "The county should include the cost of relocating or adjusting eligible utility facilities in the expense of right-of-way acquisition." TEX. CIV. STAT. art. 6702-1, § 4.303 (1994). We can only conclude that the Texas Legislature intended the term "eligible utility facilities" to be interpreted and applied consistently in each of its uses in the title. *See Dallas County Cmty. College Dist. v. Bolton,* ___ S.W.3d ___, 2005 WL 3241846 (Tex.2005) ("We must interpret a statute according to its terms, giving meaning to the language consistent with other provisions in the statute."); *McIntyre v. Ramirez,* 109 S.W.3d 741, 745 (Tex.2003) ("[W]e will not give an undefined statutory term a meaning that is out of harmony or inconsistent with other provisions in the statute"); *Barr v. Bernhard,* 562 S.W.2d 844, 849 (Tex.1978) ("[O]ne provision will not be given a meaning out of harmony or inconsistent with other provisions, although it might be susceptible of such a construction if standing alone."). Consequently, the meaning of the term used in both article 6702-1 and article 6674n-3 is the same.[10] Thus,

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[10] The Texas Civil Statutes Article 6702-1 §§ 4.302, 4.303 provided:

Section 4.302 (a) The right of eminent domain within the boundaries of a municipality with prior consent of the governing body of the municipality is conferred on counties of the state for the purpose of condemning and acquiring land, right-of-way, or easement in land, private or public, except property used for cemetery purposes, where the land, right-of-way, or easement is in the judgment of the commissioners court of the county necessary or convenient to any road that forms or will form a connecting link in the county road system or a connecting link in a state highway.

. . . .

Sec. 4.303. The county should include the cost of relocating or adjusting eligible utility facilities in the expense of right-of-way acquisition.

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where a utility facility incurs relocation costs resulting from a "county acqui[sition of] real property," through the process outlined in article 6702-1 § 4.302, *and* those relocation costs are "eligible under the law," that utility is an "eligible utility facility" due county reimbursement. *See* TEX. CIV. STAT. art. 6702-1, §§ 4.302, 4.303 (1994).

D

We have thus determined that §§ 251.101 and 251.102 were intended to retain the same meaning of "eligible utility facilities" as in the pre-codified statute.[11] Additionally we have concluded that the term "eligible utility facility" refers to a utility incurring relocation costs that are "eligible under the law" for reimbursement. We turn now to consider whether the costs incurred by CenterPoint are such costs, that is to say, whether CenterPoint is an "eligible utility facility" within the meaning of § 251.102.

(1)

The first requirement of § 251.102 is that the cost claimed for reimbursement must have resulted from a county acquisition of rights-of-way for highway construction. This requirement is satisfied. Section 251.101 authorizes a

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These provisions were repealed and replaced by §§ 251.101 and 251.102 of the Texas Transportation Code.

[11] Harris County offers its own suggestions as to the meaning of "eligible utility facilities" within the context of § 251.102. Instead of looking to the history and development of § 251.102, Harris County directs the court to a smattering of other provisions located in other portions of the code as possible definitions. Harris County has presented no cogent connection between any of these proposed provisions and the context at hand.

county to "exercise the power of eminent domain in a municipality . . . to condemn and acquire real property, a right-of-way, or an easement in public or private property . . . necessary or convenient to any road that forms or will form a connecting link in the county road system." TEX. TRANSP. CODE ANN. § 251.101. Although Harris County contends otherwise, its activity falls squarely within this statutory provision: it acquired the rights-of-way along Westpark Drive needed to construct the Westpark Tollway, a road that Harris County admits is a "connecting link" between the City of Houston and the surrounding county. *See supra* note 5. The parties do not dispute that the construction of the Westpark Tollway on the rights-of-way of the former Westpark Drive necessitated the relocation of CenterPoint's utility facilities. Thus CenterPoint satisfies the requirement of § 251.102 as having incurred costs resulting from a county acquisition for highway construction.

(2)

The second requirement under § 251.102 is that the costs incurred must be "eligible under the law." To give contextual meaning to these words, we look to the Texas Supreme Court and the case of *State v. City of Austin,* 160 Tex. 348, 331 S.W.2d 737 (1960).[12] In *City of Austin,* the Texas Supreme Court addressed the validity of a statute

[12] *City of Austin* is the foundational case recognizing the common-law rule that utilities must bear their own relocation costs and examining the validity of statutes that create an exception. *See City of Austin,* 160 Tex. 348, 331 S.W.2d 737; *see also Benbrook Water & Sewer Auth.,* 653 S.W.2d at 323; *City of Grand Prairie,* 405 F.2d at 1146 (both recognizing *City of Austin* as the "leading" and "foundational" case in this area).

requiring similar repayment of relocation costs to a utility.[13] Although *City of Austin* addresses the validity of a legislative mandate that the state repay a utility's relocation costs, the focus of the court's analysis was on the constitutional limitations of public reimbursement of relocation costs to private utilities. As such we find no reason in law or fact to restrict the principle of its holding to the state's obligation; consequently, the case is determinative of costs "eligible under the law" for purposes of § 251.102 of the Transportation Code.

The petitioner in *City of Austin,* the State of Texas, sought declaratory relief regarding the payment of relocation costs incurred by a private utility. *See City of Austin,* 331 S.W.2d at 740-42. The petitioner contended that the state's reimbursement to a private utility constituted an illegal payment of public funds to a private entity in violation of the Texas Constitution. *Id.* In denying relief to the State, the Texas Supreme Court held that "[t]he Legislature acting for the state has primary and plenary power to regulate public roads and streets . . . [and i]t may delegate that power to counties or municipal corporations." *Id.* at 741. As in *City of Austin,* we have before us an instance where the Legislature has empowered a governmental entity, Harris County, to acquire the property

[13] Specifically, the court in *City of Austin* examined Article 6674w-4 of the Texas Civil Statutes which provided, "[t]he relocation of utility facilities necessitated by the improvement of highways established as part of the National System of Interstate and Defense Highways shall be made by the utility at the cost and expense of the state provided such is eligible for Federal participation." *See City of Austin,* 331 S.W.2d at 740. The state brought a declaratory action seeking to have the reimbursement of relocation costs by government entities declared in violation of the Texas Constitution.

necessary to construct highways. "That grant of authority is conditioned, however, by the requirement that the utilities be reimbursed for the expense which they incur." *Id.* at 742. The court emphasized that a legislative act directing a particular payment must be obeyed unless it violates the Texas constitutional provision prohibiting "donation for a private purpose." A payment to a utility, the court stated, is not prohibited by the Texas Constitution so long as "the statute creating the right of reimbursement operates prospectively, deals with the matter in which the public has a real and legitimate interest, and is not fraudulent, arbitrary or capricious." *Id.* at 743. Payment under § 251.102 of the Transportation Code to CenterPoint satisfies this standard.

First, there is no contention that § 251.102 operates retrospectively in this case – nor could there be. The cost was incurred long after the statute requiring payment was passed. Second, the "public . . . has a direct and immediate interest in the relocation of utility facilities which would otherwise interfere with highway improvements."[14] *City of Austin,* 331 S.W.2d at 745. Finally, there is no evidence or contention that the statute, nor the proposed payment to

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[14] As the Texas court in *City of Austin* reasoned:

> It is important to remember that utility facilities are not placed in public streets merely for the convenience of private stockholders .... [L]ight, sewers, gas and water works are among the common necessities of modern cities, and it is a matter of common knowledge that such plants cannot be constructed and operated without running the lines and mains along or across the streets .... It is the interest of the public in receiving utility services which supports the right of utilities to use streets and highways for that purpose in the first place.

City of Austin, 331 S.W.2d at 744.

CenterPoint, can be said to be "fraudulent, arbitrary or capricious".[15] In sum, because relocation costs incurred by CenterPoint are "eligible under the law" for reimbursement, CenterPoint is an "eligible utility facility" under § 251.102 of the Texas Transportation Code.

Accordingly, the district court's judgment for CenterPoint ordering the payment of relocation costs is affirmed.[16]

III

On cross-appeal Centerpoint contends that the district court erred in denying its request for attorney's fees and prejudgment interest. A denial of attorney's fees is reviewed for abuse of discretion.[17] *Southwestern Bell Tel. Co. v. City of El Paso,* 346 F.3d 541, 550 (5th Cir.2003). The district court's ruling on prejudgment interest is also

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[15] The underlying premise of the holding in *City of Austin* is that "no net gain accrues to the utility from the relocation of its facilities in the manner and under the conditions prescribed by the statute." *Id.* at 742. We note that Harris County has not raised a "betterment" challenge to the relocation costs of CenterPoint.

[16] CenterPoint also raises claims under the Texas and United States Constitutions arising from its franchise agreement with the City of Houston. As the merits of the case have been resolved under §§ 251.101 and 251.102 of the Texas Transportation Code, we do not reach these claims.

[17] We recognize that there are specific standards of review to be applied to the underlying findings supporting a district court's grant or denial of attorney's fees. *See Southwestern Bell Tel. Co. v. City of El Paso,* 346 F.3d 541, 550 (5th Cir.2003) (holding that "[t]he district court's underlying findings of fact are subject to review for clear error and its conclusions of law are reviewed *de novo*"). Here, however, the district court summarily denied attorney's fees and prejudgment interest without any underlying findings, merely stating that "[a]ll other relief not expressly granted herein is denied."

reviewed for abuse of discretion. *See Matter of Texas Gen. Petroleum Corp.*, 52 F.3d 1330, 1339 (5th Cir.1995); *see also Hale v. Fish*, 899 F.2d 390, 404 (5th Cir.1990) ("the fate of [] prejudgment interest is in the hands of the district court").

"A district court abuses its discretion if it bases its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Ross v. Marshall*, 426 F.3d 745, 763 (5th Cir.2005). In the case at hand the district court issued a summary order denying "all other relief not expressly granted," which included both attorney's fees and prejudgment interest. Because no further discussion was provided, we are deprived of the benefit of the district court's reasoning and thus cannot conduct the required review. *See, e.g., Schwarz v. Folloder*, 767 F.2d 125, 133 (5th Cir.1985) (vacating and remanding on attorney's fee noting that "[a]lthough an award of attorney's fees, like an award of costs, is committed to the discretion of the trial court and can only be reversed for an abuse of discretion, the trial court must give reasons for its decisions . . . ; otherwise we cannot exercise meaningful review.") (internal citation omitted). Consequently we VACATE the judgment as it relates to prejudgment interest and attorney's fees and REMAND to allow the district court further to consider these claims and to provide analysis and reasons for such decisions as it may reach.

IV

In sum, §§ 251.101 and 251.102 of the Texas Transportation Code are the applicable statutes to resolve the issue of reimbursement presented in this case. However, we have found that the statutes are ambiguous relative to

the meaning of the term "eligible utility facilities." In accordance with the prescribed Texas rules of statutory construction, we have looked to the statutes that preceded codification of the Texas Transportation Code to determine that the term "eligible" describes a utility that incurs relocation costs that result from county acquisitions of highway rights-of-way authorized by statute and, second, that those relocation costs are "eligible under the law" for reimbursement. Both requirements are satisfied in this case: Because Harris County acquired a right-of-way to create the Westpark Tollway within the meaning of § 251.101, the costs were incurred as a result of a statutorily authorized county acquisition, and because § 251.102 operates prospectively, deals with a matter in which the public has a real and legitimate interest, and is not "fraudulent, arbitrary or capricious", *City of Austin,* 331 S.W.2d at 743, the relocation costs are "eligible under the law" for reimbursement. Consequently CenterPoint is an "eligible utility facility" under § 251.102 of the Texas Transportation Code, and we thus affirm the award of these costs.

On CenterPoint's cross-appeal, which seeks to reverse the denial of attorney's fees and prejudgment interest, we have determined that the district court failed to provide the reasoning necessary for us to conduct the required review, and thus we vacate that portion of the judgment.

For these reasons we AFFIRM in part, VACATE in part and REMAND to the district court only to reconsider attorney's fees and prejudgment interest and to provide reasons for such decisions as it may reach.

AFFIRMED in part; VACATED in part; and REMANDED.

APPENDIX 2

[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CENTERPOINT ENERGY HOUSTON ELECTRIC, LLC AND CENTERPOINT ENERGY ENTEX, AN UNINCORPORATED DIVISION OF CENTERPOINT ENERGY RESOURCES CORP.,	§	
Plaintiffs,	§	C. A. NO. H-03-2296
v.	§	
HARRIS COUNTY TOLL ROAD AUTHORITY AND HARRIS COUNTY,	§	
Defendants.	§	

MEMORANDUM AND ORDER
(Entered Aug. 23, 2004)

I. INTRODUCTION

This is a property action wherein the plaintiffs allege a taking without adequate compensation and due process as required under the laws of the United States and the State of Texas. The plaintiffs are Centerpoint Energy Houston Electric and Centerpoint Energy Entex (collectively "Centerpoint"). The defendants are the Harris County Toll Road Authority and Harris County. The Court accepts jurisdiction pursuant to 28 U.S.C. § 1331. Having considered the parties' cross motions for summary judgment and the relevant papers on file, the Court finds that

the defendants' motion should be DENIED and that Centerpoint's motion should be GRANTED.

II. HISTORY

Neither party disputes the material facts. Centerpoint maintains exclusive gas and electric franchises within the City of Houston (the "City"). The franchise agreements provide that Centerpoint will relocate its facilities at its own expense "within the streets or other public ways whenever such shall be reasonably necessary on account of the widening, change of grade, relocation, or other City construction within such streets or public ways." (Doc. 28, Ex. A § 3, Ex. B § 4).

The Westpark Tollway ("the Tollway") is a road that runs along the Southern Pacific rail line and a portion of Westpark Drive. In the course of developing the Tollway, the defendants acquired the City's right of way to Westpark Drive and compelled Centerpoint to relocate its adjoining gas and electric facilities. Upon completing its work, Centerpoint submitted a verified reimbursement claim that the defendants reviewed but ultimately declined to pay.

III. PARTY CONTENTIONS

A. Centerpoint

Centerpoint contends that the defendants' order to relocate without reimbursement creates an unlawful taking because the Tollway was not a City construction project and that its franchise agreements expressly limit relocation cost exposure to City construction projects. Moreover, Centerpoint contends that Texas transportation

law mandates reimbursement from the defendants. In particular, Centerpoint cites Section 251.102 of the Texas Transportation Code, which provides that "[a] county shall include the cost of relocating or adjusting an eligible utility facility in the expense of right-of-way acquisition." TEX. TRANS. CODE § 251.102. Finally, Centerpoint contends that the defendants impaired its franchise agreement in violation of the Contracts Clause of the United States Constitution by enacting rules in April 2001 that broaden the conditions under which Centerpoint can be compelled to relocate facilities at its own expense.

B. Harris County

In their response and cross motion for summary judgment, the defendants contend that Centerpoint is not entitled to reimbursement because it had no interest in the land from which it was compelled to relocate. In fact, the defendants contend that the common law requires utilities to relocate facilities in the public right of way when state or local authorities request it for public use and convenience. Moreover, the defendants contend that no taking occurred because Centerpoint's only compensable interest is the right to locate its facilities in the public right of way and that right has not been impaired. For this reason, the defendants also contend that no contract impairment exists. Finally, the defendants make another common law argument that utilities are subservient to transportation needs and, therefore, Centerpoint was on notice that it might one day have to relocate its facilities at its own expense to accommodate improvements.

IV. LEGAL STANDARDS

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party bears the initial burden of "informing the Court of the basis of its motion" and identifying those portions of the record "which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In adjudicating a motion for summary judgment, the Court must view all facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654 (1962)).

Once the moving party meets its burden, the nonmoving party must "go beyond the pleadings" and designate "specific facts" in the record "showing that there is a genuine issue for trial." *Id.* at 324. An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *Anderson v. Liberty Lobby,* Inc., 477 U.S. 242, 247-49 (1986). A failure on the part of the nonmoving party to offer proof concerning an essential element of its case necessarily renders all other facts immaterial and mandates a finding that no genuine issue of fact exists. *Saunders v. Michelin Tire Corp.*, 942 F.2d 299, 301 (5th Cir. 1991).

The primary inquiry here is whether the material facts present a sufficient disagreement as to require a trial, or whether the facts are sufficiently one-sided that one party should prevail as a matter of law. *Anderson*, 477

U.S. at 251-52. The case's substantive law identifies the material facts. *Id.* at 248. Only disputed facts potentially affecting the outcome of the suit under the substantive law preclude the entry of a summary judgment. *Id.*

V. ANALYSIS

The defendants' motion for summary judgment argues that common law precedent requires utilities to perform facility relocation at their own expense. This assertion might be correct in situations where utilities assume the risk, primarily for their own benefit, of laying pipes and wires throughout unfranchised county areas. *See, e.g., City of Grand Prairie v. Amer. Tele. & Tele. Co.*, 405 F.2d 1144, 46 (5th Cir. 1969) (the common law requires that utilities must relocate their facilities at their own expense when the government grants installation rights). In the instant matter, however, the common law does not apply because Westpark Drive was a franchised area and Centerpoint's facilities were there *before* the defendants acquired the City's right-of-way.

The defendants' next argument seeks to establish that there is no difference between city and state construction. Specifically, the defendants rely on *Northern States Power Co. v. Federal Transit Administration*, 358 F.3d 1050 (8th Cir. 2004) to contend that it owes no reimbursement to Centerpoint because the Westpark Tollway extends into the City and the franchise agreements provide that Centerpoint must bear its own relocation costs when accommodating City construction.

In *Northern States Power*, Minnesota constructed a light rail system in Minneapolis and compelled the local utility to relocate its facilities without reimbursement.

Focusing on the fact that the relevant franchise agreement had a relocation clause that explicitly limited reimbursement to instances where the city vacates the public way, the court denied the utility's claim for reimbursement. Nothing in the court's holding suggests that state construction is equivalent to city construction. It is obvious that the court did not reach this question because the franchise agreement's explicit vacation requirement made the issue moot. Curiously, the defendants failed to address the salient fact that Centerpoint's franchise agreements do not contain reimbursement vacation requirements. Indeed, "City construction" is the only relevant limitation that the City applied to Centerpoint's right to reimbursement. Hence, to avoid reimbursement liability, the defendants must show that "City construction" includes state construction projects. Considering that there are many words available to generally describe "government" construction, the Court finds that the City's use of the word "City" in its franchise agreements reveals a specific intent to exclusively reserve the reimbursement limitation for its projects.

Notwithstanding the defendants' contention that the common law bars utility relocation reimbursements in county areas, Texas law unequivocally provides that when a county acquires a right of way within a municipality, the county shall pay the cost of relocating all eligible facilities. TEX. TRANS. CODE § 251.102. Neither party disputes that Centerpoint had to relocate its facilities on Westpark Drive only after the defendants acquired the City's right of way. The defendants argue, however, that Centerpoint's facilities are not "eligible facilities." In support, the defendants contend that eligible facilities are facilities that are located on utility owned property or on property that a

utility controls through easement rights. As a matter of law, the defendants' "eligible facility" explanation is untenable because it falsely presumes that utilities have fewer rights than other legal entities. More specifically, the defendants' construction implies that, but for the instant statute, a county could freely disregard a utility's real estate title or easement interests. There is no need for laws that provide existing rights. Accordingly, an eligible facility cannot be limited to one where the utility has an ownership or easement interest in the underlying real estate.

In contrast, Centerpoint contends that eligible facilities are those that a county can pay to relocate without inequitably transferring the public's wealth to a utility's coffers. This construction is accurate because it establishes an equitable balance between utility interests and the public's interest. In the instance where a utility's facilities are in imminent need of repair or upgrade, it would be inequitable to pass those costs along to the public whenever roads needed improvements. Likewise, compelling a utility to waste useful and sufficient facilities in an uncompensated relocation would unfairly burden utility ratepayers and shareholders. With regard to cities and utilities, franchise agreements preserve equity through franchise fees.[1]

In the instant matter, however, no evidence suggests that the state has authorized the defendants to grant franchises or receive franchise fees. Accordingly, no reason exists to find that the defendants have any third party or

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[1] Centerpoint's annual franchise payment to the City of Houston exceeds 90 million dollars.

other statutory rights to powers that the City negotiated for its own benefit. As it is written, Section 251.101 of the Texas Transportation Code preserves the balance of equity between the public and utilities when a county acquires a right of way within a municipality.

The defendants' derive their remaining argument from the Harris County Road Law, Acts of the 33rd Legislature, Ch. 17 p. 64 et seq. (1913). In relevant part, the Harris County Road Law at Section 2 provides that Harris County may "adopt . . . rules and regulations for . . . the laying, constructing, maintaining, and repairing of . . . public utility facilities in . . . the county road right-of-way. . . . " *Id.* At Section 33, the Harris County Road Law further provides that it controls in the event that a conflict exists with other Texas laws. *See id.* In the course of developing the Westpark Tollway, the defendant Harris County promulgated rules that require utilities to bear the cost of facility relocations. Accordingly, the defendants contend that its rules, pursuant to the authority granted by the Harris County Road Law, preclude Centerpoint's reimbursement claims.

This argument, however, is flawed because the Harris County Road Law does not condone ultra vires activity. Indeed, nothing in the Harris County Road Law allows the defendants to compel an unreimbursed relocation of utility facilities on roads where the county must first acquire City rights of way. Accordingly, the defendants must reimburse Centerpoint for the cost of relocating it facilities. Having resolved this matter on state grounds, the Court finds no basis to address the plaintiffs' claims under the laws of the United States because the Court is of the opinion that while the analysis may be different, the result would be the same.

VI. CONCLUSION

In light of the discussion above, the Court DENIES the defendants' motion for summary judgment and GRANTS Centerpoint's motion for summary judgment.

It is so ORDERED.

Signed this 20th day of August, 2004.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
United States District Judge

APPENDIX 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CENTERPOINT ENERGY ENTEX and CENTERPOINT ENERGY HOUSTON ELECTRIC, LLC,	§	
Plaintiff,	§	CIVIL ACTION NO.
VS.	§	H-03-2296
HARRIS COUNTY and HARRIS COUNTY TOLL ROAD AUTHORITY,	§	
Defendant.	§	

FINAL JUDGMENT

(Filed Nov. 24, 2004)

The plaintiffs, CenterPoint Energy Houston Electric, LLC and CenterPoint Energy Entex moved for summary judgment on all claims asserted by the plaintiffs, and the defendants Harris County and Harris County Toll Road Authority filed a cross-motion for summary judgment. After reviewing all pleadings, motions, response and reply briefs, and evidence submitted by all parties, as well as the applicable law, the Court found the plaintiffs' motion for summary judgment to be meritorious. Accordingly, on August 20, 2004, the Court granted the plaintiffs' motion for summary judgment and denied the defendants' cross-motion.

NOW, THEREFORE, the Court is of the opinion and finds that judgment should be rendered in favor of the plaintiffs and against the defendants as follows:

The plaintiff, CenterPoint Energy Houston Electric, LLC, shall have and recover judgment against the defendants Harris County and Harris County Toll Road Authority, jointly and severally, the amount of $5,989,772.91 in unreimbursed relocation costs. Interest shall accrue on such amount at the rate of 2.53% per annum from the date this Final Judgment is entered and until this judgment is paid.

The plaintiff, CenterPoint Energy Entex, shall have and recover judgment against the defendant Harris County and Harris County Toll Road Authority, jointly and severally, the amount of $4,266,901.06 in unreimbursed relocation costs. Interest shall accrue on such amount at the rate of 2.53% per annum from the date of this Final Judgment is entered and until this judgment is paid.

It is further ORDERED that all costs of this action are assessed against the defendants Harris County and Harris County Toll Road Authority. All other relief not expressly granted herein is denied.

SIGNED and ENTERED 11/24/2004

/s/ Kenneth M. Hoyt
Kenneth M. Hoyt
United States District Judge

APPENDIX 4

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-20992

CENTERPOINT ENERGY HOUSTON ELECTRIC LLC; CENTERPOINT ENERGY ENTEX, an Unincorporated Division of Centerpoint Energy Resources Corp

Plaintiffs-Appellee-Cross-Appellants

v.

HARRIS COUNTY TOLL ROAD AUTHORITY; HARRIS COUNTY

Defendants-Appellant-Cross-Appellees

Appeals from the United States District Court for the Southern District of Texas, Houston

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ON PETITION FOR REHEARING EN BANC

(Filed Feb. 14, 2006)

(Opinion 1/16/06, 5 Cir., ___, ___ F.3d ___)

Before JOLLY and BARKSDALE, Circuit Judges, and LITTLE, District Judge*.

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* District Judge of the Western District of Louisiana, sitting by designation.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP.. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
United States Circuit Judge

APPENDIX 5

Texas Transp. Code § 251.102. Cost of Relocating or Adjusting Utility Facility

A county shall include the cost of relocating or adjusting an eligible utility facility in the expense of right-of-way acquisition.

Acts 1995, 74th Leg., ch. 165, § 1, eff. Sept. 1, 1995.